

1 BEFORE THE
2 ILLINOIS COMMERCE COMMISSION

3 IN THE MATTER OF:)
4)
5 COMMONWEALTH EDISON COMPANY,)
6) No. 01 -0423
7 Petition for approval of delivery)
8 services tariffs and tariff)
9 revisions and of residential)
10 delivery services implementation)
11 plan and for approval of certain)
12 other amendments and additions to)
13 its rates, terms and conditions.)
14

15 Chicago, Illinois
16 October 31, 2001

17 Met, pursuant to notice, at 10:00 a.m.

18 BEFORE:

19 MS. E. O'CONNELL-DIAZ and MR. P. CASEY,
20 Administrative Law Judges

21 APPEARANCES:

22 FOLEY & LARDNER, by
23 MR. PAUL HANZLIK, MR. ROBERT FELDMEIER
24 and MS. CYNTHIA FONNER
25 3 First National Plaza
26 Suite 4100
27 Chicago, Illinois 60602
28 appearing for Commonwealth Edison;

1 APPEARANCES (Cont'd)

2 PIPER, MARBURY, RUDNICK & WOLFE, by
3 MR. DAVID I. FEIN and
4 MR. CHRISTOPHER J. TOWNSEND
5 203 North LaSalle Street
6 Suite 1800
7 Chicago, Illinois 60601
8 appearing for AES NewEnergy, Inc.,
9 Enron Energy Services, Inc., and
10 Blackhawk Energy Services, Inc.;

11
12 GIORDANO & NEILAN, by
13 MR. PAUL NEILAN
14 333 North Michigan
15 Suite 2800
16 Chicago, Illinois 60601
17 appearing for TrizecHahn Office
18 Properties, Inc.;

19
20 MR. STEVEN G. REVETHIS and MR. JOHN C. FEELEY
21 160 North LaSalle Street
22 Suite C-800
23 Chicago, Illinois 60601
24 appearing for ICC Staff;

25
26 MS. ERIKA EDWARDS and MR. MARK KAMINSKI
27 100 West Randolph
28 Chicago, Illinois 60601
29 appearing for People of the
30 State of Illinois;

31
32 MS. LEIJUANA DOSS and MR. DAVID HEATON
33 69 West Washington
34 Suite 700
35 Chicago, Illinois 60602
36 appearing for People of Cook County;

37
38 MS. JULIE LUCAS
39 208 South LaSalle Street
40 Suite 1760
41 Chicago, Illinois 60604
42 appearing for Citizens Utility Board;

1 APPEARANCES (cont'd)

2 MR. RONALD D. JOLLY, ALAN H. NEFF
3 and MR. CONRAD REDDICK
4 30 North LaSalle Street
5 Suite 900
6 Chicago, Illinois 60602
7 appearing for City of Chicago;

8 MR. MICHAEL MUNSON
9 8300 Sears Tower
10 Chicago, Illinois 60606
11 appearing for BOMA, NEMA, and Nicor;

12 MR. ROBERT P. JARED
13 106 E. 2nd Street, P.O. Box 4350
14 Davenport, Iowa 52808
15 appearing for MidAmerican Energy Company.

16

17

18

19

20

21

22

SULLIVAN REPORTING COMPANY, by

Barbara A. Perkovich, CSR

1 I N D E X
2 Re - Re - By
2 Witnesses: Direct Cross direct cross Judge
3 NONE

4
5
6 E X H I B I T S

7
8 Number For Identification In Evidence
8 NONE MARKED

9
10
11
12
13
14
15
16
17
18
19
20
21
22

1 JUDGE O'CONNELL-DIAZ: Pursuant to the
2 direction of the Illinois Commerce Commission, we
3 now call Docket No. 01-0423. This is in the matter
4 of Commonwealth Edison Company, petition for
5 approval of delivery services tariffs and tariff
6 revisions and of residential delivery services
7 implementation plan and for approval of certain
8 other amendments and additions to its rates, terms,
9 and conditions.

10 May we have the appearances for the
11 record, please.

12 MR. HANZLIK: Foley and Lardner, by Paul Hanzlik,
13 Robert Feldmeier and Cynthia Fonner, 3 First
14 National Plaza, Suite 4100, Chicago, Illinois
15 60602, appearing for Commonwealth Edison Company.

16 MR. MUNSON: Michael Munson on behalf of the
17 Building Owners and Managers Association of Chicago
18 and Suburban Chicago National Energy Marketers
19 Association and Nicor Energy, LLC, 8300 Sears
20 Tower, 233 South Wacker Drive, Chicago, Illinois
21 60606.

22 MR. JOLLY: On behalf of the City of Chicago,

1 Ronald D. Jolly, 30 North LaSalle, Suite 900,
2 Chicago, Illinois 60602.

3 MR. KAMINSKI: Erika Edwards and Mark Kaminski,
4 100 West Randolph, Chicago, Illinois 60601,
5 Illinois Attorney General's Office appearing on
6 behalf of the People of the State of Illinois.

7 MR. REVETHIS: Steven G. Revethis and John C.
8 Feeley, staff counsel appearing on behalf of the
9 Illinois Commerce Commission staff, 160 North
10 LaSalle, Chicago, Illinois 60601.

11 MR. FEIN: David I. Fein and Christopher J.
12 Townsend of the law firm of Piper, Marbury, Rudnick
13 and Wolfe, 203 North LaSalle Street, Suite 1800,
14 Chicago, Illinois 60601, appearing on behalf of AES
15 NewEnergy, Inc., Enron Energy Services, Inc., and
16 Blackhawk Energy Services, LLC.

17 MS. LUCAS: Julie Lucas appearing on behalf of
18 the Citizens Utility Board, 208 South LaSalle,
19 Suite 1760, Chicago, Illinois 60604.

20 MS. DOSS: Leijuana Doss and David Heaton, Cook
21 County State's Attorney's Office, 69 West
22 Washington, Suite 700, Chicago, Illinois 60602,

1 appearing on behalf of the People of Cook County.

2 MR. JARED: Robert P., Jared, J-a-r-e-d, 106
3 East 2nd Street, P.O. Box 4350, Davenport, Iowa
4 52808, on behalf of MidAmerican Energy Company.

5 MR. NEILAN: Paul Neilan, Giordano and Neilan,
6 333 North Michigan, Suite 2800, Chicago, Illinois
7 60601, appearing on behalf of TrizecHahn Office
8 Properties, Inc.

9 JUDGE O'CONNELL-DIAZ: Let the record reflect
10 that we had put over to today the request for
11 confidential treatment that had been filed. And
12 our records show that there have been two requests
13 for confidential designation, one being the fourth
14 motion by Com Ed, as well as a motion by the ARES
15 Coalition.

16 I think we would like to take those
17 first. We do have kind of a laundry list of other
18 motions too, as well as any motions in limine or
19 anything of that nature that we had set this status
20 originally to cover today. So if we could proceed
21 with Edison's motion as that was filed -- was filed
22 first.

1 MS. FONNER: Thank you, your Honor. There are
2 seven different sets of documents that are
3 contained in this motion. The first is in response
4 to staff data request BAL, which was an oral data
5 request and they concern Bates range ST 005271
6 through 5284.

7 These particular documents reflect
8 awarded price of contracts versus price paid out.
9 As well as terms and conditions of contracts that
10 were negotiated between Com Ed and individual
11 vendors. They do contain pricing information,
12 other information that would be competitively
13 sensitive and would erode Com Ed's bargaining
14 position were they publicly available.

15 Com Ed is asking that these documents be
16 treated as confidential in order to maintain the
17 legitimate business interest of Com Ed, as well as
18 of the particular contractors involved.

19 JUDGE O'CONNELL-DIAZ: Any party have any
20 objection to the designation of the documents ST
21 0005271 through ST 005284 as mentioned by
22 Ms. Fonner?

1 MR. JOLLY: The City would object on the same
2 grounds that we've objected in the past as to this
3 information in the past, that the information would
4 not necessarily set a basement, as Com Ed has
5 argued, for other potential competitor vendors.

6 In fact, it could set a ceiling at which
7 they might aim their future proposals to Edison,
8 and could in fact reduce Edison's costs on a going
9 forward basis. And on that basis, we feel that Com
10 Ed has not made a showing that these documents are
11 deserving of confidential treatment.

12 JUDGE CASEY: Any other objections?

13 MS. DOSS: Cook County would join in the
14 objection of the City.

15 MS. LUCAS: As would CUB.

16 JUDGE CASEY: Anybody else?

17 MR. KAMINSKI: The AG would join the City's
18 objections.

19 JUDGE CASEY: The objections are noted.
20 Proprietary treatment will be granted. We've
21 considered the arguments made by the parties based
22 on the type of information that's addressed in the

1 motion, the pricing information , we would note that
2 there is a potential for erosion of bargaining
3 position, and that the information is competitively
4 or commercially sensitive. The next set.

5 MS. FONNER: The next set responds to staff data
6 request BAL 3.02. The documents produced in
7 response to this request contain specific
8 information of costs of particular equipment, such
9 as transformers and the like, which Com Ed has
10 purchased in recent past, and contains specific
11 line items, item numbers.

12 And for the same reasons as previously
13 noted, this would erode the bargaining position of
14 Com Ed, and for the protection of legitimate
15 interests of Com Ed's dealings with future
16 contractors we would request that this information
17 be maintained as confidential.

18 JUDGE CASEY: We will take a look at these
19 documents, 3.02. Therein it refers to average
20 costs, and not specific costs. We are interested
21 in finding out how an average cost -- that
22 disclosure of an average cost would impair the

1 Company's bargaining position , and that an average
2 cost is somehow commercially sensitive.

3 MS. FONNER: Because it represents particular
4 transformers. The 5291, in terms of not only
5 general transformers , but talked specifically about
6 the 138 kV to the 212 kV, you are talking about a
7 specific type of transformers, not even
8 transformers in general. It's the Company's
9 position that not even having transformers in
10 general as a line item would give vendors an
11 ability to gauge what Com Ed would be willing to
12 pay for transformer.

13 This is even more egregious in that it
14 talks about the cost for particular types of
15 transformers, that's in response to 5291 and 5292.
16 And 5293. As you see later, the request asks for
17 all the transformers in 5294 at the the end, lists
18 out specific transformers, and the dollars paid.

19 All of the these, it's Com Ed's position
20 that regardless of whether it's based upon an
21 average or specific numbers, the same information
22 would erode Com Ed's bargaining position with

1 respect to particular vendors. And that an average
2 cost would provide some vendors who had perhaps
3 given Com Ed the benefit of lower costs in the,
4 future would increase those, which would
5 necessarily increase the costs of Com Ed's
6 distribution projects in the future and would
7 necessarily have to be passed on to ratepayers.

8 JUDGE CASEY: Any objections?

9 MR. JOLLY: The City would have the same
10 objection that it made last time, that now that
11 Edison has established that public disclosure of
12 such information would necessarily increase their
13 costs, in fact it could decrease their costs. So
14 on that basis, we would object to the confidential
15 designation.

16 JUDGE CASEY: County, CUB AG agree with the
17 objection or concur with the objection?

18 MR. KAMINSKI: Yes.

19 JUDGE CASEY: Can we assume, then, for the
20 remainder of these documents that will be the case
21 so we don't have to keep asking?

22 MS. LUCAS: Yes.

1 JUDGE O'CONNELL-DIAZ: In accordance with our
2 previous ruling we find that the information
3 contained in the documents ST 005291 through ST
4 005297 contain pricing information that is
5 commercially sensitive, and may erode the
6 bargaining position of the company, and in turn
7 cause the company to incur costs which the
8 ratepayers would -- so those documents are
9 therefore designated as confidential.

10 MS. FONNER: The next set is in response to ARES
11 data request 8.05. There were a couple actual
12 subcomponents within here, Bates range AC 0001188
13 through 1189, contain specific information relating
14 to current and ongoing distribution projects which
15 could, again, be used by vendors, and would erode
16 Com Ed's bargaining position in the future in that
17 it provides detailed analysis of what Com Ed is
18 projected to spend for distribution projects, what
19 it has spent to date and what it projects to spend
20 in the future.

21 JUDGE O'CONNELL-DIAZ: Any objection? Same
22 objection?

1 MR. JOLLY: Same objection as before.

2 JUDGE CASEY: Over the objection, the matters
3 will be designated confidential based on their
4 commercial sensitivity, as well as potential
5 erosion of the bargaining position.

6 MS. FONNER: The next set of documents contained
7 within ARES data request 8.05 is Bates range AC
8 0001196 through 1202. They were produced
9 specifically in response to ARES 8.05, but in fact
10 they are identical documents to those which were
11 produced in response to staff data request BAL,
12 data question 3.02, which your Honors have just
13 ruled is to be treated as confidential.

14 JUDGE CASEY: Mr. Jolly.

15 MR. JOLLY: Same objection as last time.

16 JUDGE CASEY: Okay. Those documents, 0001196
17 through 0001202 will be afforded confidential
18 treatment based on the commercial sensitivity as
19 well as the potential that it could erode the
20 bargaining position of the company.

21 MS. FONNER: The next set of documents is in
22 response to City of Chicago data request 3.221. It

1 contains Bates range COC 0001007 through 1106.
2 These documents are individual invoices from
3 contractors and contain specific information as to
4 prices, terms and conditions that were individually
5 negotiated between Com Ed and the contractors and
6 would erode the position of Com Ed in its
7 bargaining position as well as preserving the
8 legitimate interest of the contractors at issue.

9 JUDGE CASEY: Mr. Jolly, do you want to go ahead
10 and make your objection?

11 MR. JOLLY: It's the same objection.

12 JUDGE CASEY: Do you have any specific
13 objections?

14 MR. JOLLY: No, just for the conceptual issue.

15 JUDGE CASEY: Documents COC 0001 007 through COC
16 0001106 will be afforded confidential treatment.
17 It's clear that these are either contracts or
18 specific -- vendor specific agreements of which
19 they are commercially sensitive to the company as
20 well as that vendor.

21 A disclosure of this could in fact erode
22 the company's bargaining position and therefore we

1 will be afforded confidential treatment.

2 MS. FONNER: The next set of documents is in
3 response to attorney general data request 2.2A and
4 contains Bates range AG 0015010 as well as AG
5 0015217 through 15220. This information contains
6 specific information with regard to Com Ed's
7 dispatchable backup and generation reliability
8 pricing experiment.

9 It contains not only the number of
10 customers on this experiment, but identifies the
11 particular customers involved, the type of
12 generation installed, pricing for the experiment
13 and strategies of Com Ed planners in terms of their
14 analysis of the experiment in terms of the past and
15 what is expected on a going forward basis.

16 I would note that that in order to
17 provide the most information, Commonwealth Edison
18 has already provided a redacted version of those
19 documents to the parties in this case, and has been
20 provided to the administrative law judges so that
21 you might see how much is redacted in respect to
22 those particular pages.

1 The remainder of information on
2 dispatchable backup and generation has already been
3 provided, so it's this limited number of pages.

4 MR. KAMINSKI: AG has no objection to the
5 redaction of customer names. However, we fail to
6 see why the total number that this pricing
7 experiment is available to is confidential, or
8 whether the prices that are paid to -- or the
9 various costs of this experiment are confidential.

10 As long as the names of the customers
11 are redacted, I feel that the rest of this should
12 be available.

13 MS. FONNER: Well, Commonwealth Edison has
14 already identified the particular feeders involved.
15 Identifying the particular number of customers
16 involved may lead somebody to ascertain the number
17 of customers who are actually involved in that
18 experiment.

19 In looking at those particular feeders,
20 if they can say there are, you know, seven
21 customers on that, and looking at the distribution
22 capabilities of those customers might very well

1 lead someone to be able to ascertain the particular
2 identity of the customers involved.

3 And again, providing the dollar values
4 that customers are receiving is confidential to
5 that customer, that is customer specific
6 information.

7 MS. DOSS: Cook County would join in the
8 objection, and just note that this is an
9 experiment, and as such, it's for the purposes of
10 learning and so if it could be kept confidential, I
11 think would be a heightened concern.

12 As far as having it being labeled as an
13 experiment, so I don't see the harm to the public
14 having this made public.

15 MS. FONNER: I would note that the Commerce
16 Commission excepts the fact that these are treated
17 as confidential. And there was in fact a redacted
18 portion that was filed with the Commission earlier
19 this year. We have actually undertaken and
20 provided a broader amount of information than was
21 provided with the filing of the billing and pricing
22 experiment for purposes of this proceeding.

1 But that this is commonly recognize by
2 the Commission as something that is sensitive to
3 the company as well as to the customers.

4 MR. KAMINSKI: In reply to the customer specific
5 information regarding the prices, and the payments
6 made to customers, if the customers' names are
7 removed, I don't see why the numbers cannot remain.

8 JUDGE O'CONNELL-DIAZ: Mr. Kaminski, what do you
9 have to say in response Ms. Fonner's assertion that
10 due to the information with regard to the feeder,
11 that it would be apparent who the customers were
12 based on the feeder information that is woven
13 throughout these documents?

14 MR. KAMINSKI: If the feeder information is
15 directly indicative of the individual customers,
16 then we have no problem with that being redacted.

17 MR. FONNER: I would note based upon
18 Mr. Kaminski's objection that the information that
19 was provided actually describes the assessment of
20 what type of feeder, the criteria for the feeder,
21 and the number of feeders, so it could potentially
22 lead someone to be able to ascertain the particular

1 identity of the customers, based upon the redacted
2 information that is provided.

3 JUDGE CASEY: From a particular standpoint, if
4 the feeder information is redacted and the customer
5 name information is redacted, we've looked at,
6 let's say, page 0015218, take a look at both
7 confidential and then the redacted. So what we
8 would have left then is the dollar amount.

9 MR. KAMINSKI: Yes.

10 JUDGE CASEY: What is that going to give you?

11 JUDGE O'CONNELL-DIAZ: What does that add to the
12 record?

13 MR. KAMINSKI: We withdraw the objection.

14 MS. DOSS: Cook County would maintain their
15 objection.

16 JUDGE O'CONNELL-DIAZ: I couldn't hear you, what
17 did you say?

18 MS. DOSS: We'll still object.

19 JUDGE O'CONNELL-DIAZ: With regard to AG 0015010
20 through AG 0015220, those documents are -- we note
21 for the record that the AG has withdrawn its
22 objection, Cook County still has an objection. We

1 would designate these documents as confidential,
2 based on customer specific information that are
3 contained in those documents.

4 MR. FONNER: The next set of documents responds
5 to attorney general data request 1.01C and 1.29.
6 There are four pages within those. There are
7 actually two set groups.

8 AG 000379 through 80 contain a
9 discussion of compensation to a specific
10 Commonwealth Edison employee, in addition to
11 respect for the individual's private financial
12 matter, as well as the company's privacy and
13 protecting the information that pertains to
14 individual people, Commonwealth Edison is
15 requesting that those particular documents, those
16 two pages, be treated as confidential.

17 JUDGE CASEY: Mr. Kaminski.

18 MR. KAMINSKI: This individual, the payment is
19 not a salary, rather it is a one time payment, and
20 it is labeled as in recognition of efforts
21 regarding the transmission distribution system, so
22 I think this is essential to the case, and

1 indicative of the effort that went into bringing
2 the distribution system up to speed.

3 JUDGE CASEY: So we are clear, both the name of
4 the employee, as well as the amount of payment to
5 the employee have been redacted, or that's -- I
6 have a redacted version.

7 MR. FONNER: The redacted version has been
8 provided to the attorney general, so those that
9 signed level 1 of the confidentiality agreement
10 have received the entirety. The reason this was
11 redacted were because there are other portions of
12 this document that were not relevant, so those were
13 redacted.

14 But the particular two pages at issue
15 have been provided to all those that signed the
16 protective order at level 1. So Mr. Kaminski has
17 this information, is free to use it at hearing with
18 the appropriate safeguards that have been
19 established.

20 JUDGE CASEY: Ms. Doss.

21 MS. DOSS: Cook County will object, noting that
22 this is a Com Ed officer, it is not simply an

1 employee. As such, that information should be made
2 public.

3 JUDGE CASEY: Any other objections?

4 MR. JOLLY: The City would join in the objections
5 of the AG.

6 MS. LUCAS: As would CUB.

7 MR. FONNER: I would just note that whether one
8 is an officer or an employee, that one's interest
9 in protecting their financial privacy remains the
10 same.

11 MS. DOSS: I would just object to that.

12 MR. KAMINSKI: One last thing I would note, that
13 the SEC requires that certain officers of the
14 company have to report the compensation levels of
15 those officers.

16 JUDGE O'CONNELL-DIAZ: Certain officers, which
17 ones?

18 MR. KAMINSKI: Top five. I don't have specific
19 knowledge as to whether this person is one of the
20 top five, however that is information.

21 JUDGE O'CONNELL-DIAZ: So you are just throwing
22 that out there. We are going to redact the

1 individual's name from these documents.

2 JUDGE CASEY: As well as his title, so the
3 specific reference to a specific employee. The
4 fact that the dollar amount that someone was paid
5 will not be afforded confidential treatment.

6 MR. FONNER: Just so I'm clear, your Honor, in
7 terms of the name, it lists not only the name, the
8 individual's name and title, but talks about the
9 previous position where they came from, what their
10 efforts were, so the descriptions contained within
11 the document would lead to the same ability to be
12 able to ascertain the identity of this particular
13 individual.

14 MS. DOSS: I would object. I don't think -- you
15 know, Ms. Fonner continues to have this segue way
16 into everyone can determine who this person is.
17 This isn't a game of let's put the pieces together
18 and find out who this is. This information is
19 important, and should be kept public. And the
20 ALJ's have ruled that the title and name is
21 redacted, then that's sufficient.

22 JUDGE CASEY: Well, let's go through it, then.

1 This is it what we feel should be redacted or
2 stricken. The name and title on the first -- I'm
3 looking at document 000379, sentence begins the
4 chairman. Delete the person's office and name. Go
5 to the fourth line, delete the person's name. Go
6 to the whereas paragraph, delete, first line,
7 delete the person's name and position, second line
8 delete the eighth, ninth and tenth word.

9 Next paragraph, first sentence, first
10 line, delete the individual's name. Next document,
11 0000380, last full paragraph, first sentence,
12 delete the individual's name. Last paragraph,
13 second sentence, delete the second and third word.

14 MR. FONNER: Next with the subset one that
15 contained documents AG 000870 and 873. These
16 contain a report of discussions between senior
17 officers and senior government officials between
18 Com Ed, produced in response to chairman -- board
19 minutes, and discussions of meetings that occurred
20 at Com Ed board meetings.

21 These are similar documents to those
22 which have been previously produced under a

1 confidentiality -- under the protective order in
2 that public release of this could very well have a
3 chilling effect possible the board of directors at
4 Commonwealth Edison.

5 Commonwealth Edison is asking that these
6 two documents be treated as confidential. The
7 documents that were produced are redacted. The
8 redactions simply remove information that is not
9 relevant to these proceedings. So what the
10 administrative law judges has before them has been
11 provided to parties in this proceeding that have
12 signed level 1 of the protective order.

13 JUDGE CASEY: The correspondence is what again,
14 where is that coming from? Is that a report back
15 to the board?

16 MR. FONNER: Yes, your Honor, this reflects
17 discussions within the board.

18 JUDGE CASEY: Mr. Jolly, Mr. Kaminski.

19 MR. KAMINSKI: These are just general
20 descriptions of discussions. I fail to see where
21 there is any real confidential information being
22 revealed here. It says things like the tone of the

1 meeting was good. I don't see what people can get
2 in the way of confidential information from that.

3 MR. FONNER: It discusses particular meetings
4 and discussion between, again, Commonwealth Edison
5 officers, and government officials.

6 JUDGE CASEY: Are there any other objections?

7 MS. DOSS: County objects as well.

8 JUDGE CASEY: And basis of the objection?

9 MS. DOSS: The same as the AG 's that these are
10 general topics.

11 MS. LUCAS: CUB would join in the objection.

12 JUDGE CASEY: We are sensitive of the potential
13 chilling effect that disclosure of minutes or
14 discussions held in board meetings.

15 A review of the document does not
16 disclose what we would determine a disclosure of
17 which would be chilling in future discussions.
18 However, there appears, the last sentence on Page
19 000873 should be redacted, as that is the
20 administrative law judges' determination that that
21 would be the only thing within what document that
22 could be viewed as potentially chilling.

1 MR. FONNER: The final set of documents that was
2 in response to City of Chicago data request 1.114
3 contains Bates range COC 0001325 through 1336.
4 These are documents taken from reports or
5 presentations that discuss Commonwealth Edison's
6 thread of distributed generation within its service
7 territory.

8 It reflects the strategic thinking of
9 Commonwealth Edison's thinking and its business
10 planners and is competitively sensitive and we
11 therefore request that these documents be treated
12 as confidential and proprietary.

13 JUDGE O'CONNELL-DIAZ: Any objection?

14 MR. JOLLY: The City would object. On the
15 grounds that the documents that are referenced in
16 the response appear to be pretty dated. According
17 to Com Ed's response, they predate open access, so
18 to me I interpret that to mean to be 1997 at the
19 earliest, or 1999, possibly. I'm not certain if
20 they were referring there to the date of passage of
21 the amendment of the Public Utilities Act.

22 JUDGE O'CONNELL-DIAZ: Which document are you

1 referring to?

2 MR. JOLLY: I'm looking at 114B.

3 MR. FONNER: Actually they all post date.

4 MR. JOLLY: I misread that. Strike that.

5 JUDGE O'CONNELL-DIAZ: So now you are going to
6 withdraw your objection?

7 MR. JOLLY: Actually, I might. And I will.

8 JUDGE CASEY: Anybody else want to make an
9 objection and then withdraw it? There will be no
10 objection, those documents will be afforded
11 confidential and proprietary treatment.

12 MR. FONNER: And that concludes Commonwealth
13 Edison's fourth motion for treatment of documents
14 as confidential or confidential and proprietary.

15 JUDGE CASEY: Mr. Fein.

16 MR. FEIN: Thank you, your Honors. The ARES
17 Coalition filed a motion for confidential treatment
18 that addresses two sets of information.

19 The first set sought specific
20 information regarding the impact of the Company's
21 proposal upon the specific individual customers of
22 AES New Energy. The information is competitively

1 sensitive, and could be use to the detriment of AES
2 New Energy in the market. And it's my understand
3 that, at least from the Company, there is no
4 objection to the treatment of the ARES Coalition's
5 response to Com Ed data request 2.3066.

6 The second has to do with work papers
7 that were relied upon by members of the ARES
8 coalition in produceing customer impact analyses
9 that were contained in their testimony in this
10 proceeding. The ARES Coalition and the Company
11 have entered into a protective agreement for that
12 information. The information has been provided to
13 the Company, already, and this information is
14 specific customers' information for both customers
15 of AES New Energy, and Enron.

16 MR. FONNER: And I would agree with Mr. Fein's
17 statement that Commonwealth Edison Company has no
18 objection to the treatment of these documents as
19 confidential.

20 JUDGE CASEY: Any objection? There being no
21 objection, the documents set forth in the ARES
22 Coalition's first motion for treatment of documents

1 as confidential or confidential and proprietary
2 will be afforded confidential treatment.

3 JUDGE O'CONNELL-DIAZ: With regard to the motion
4 to compel filed by the AES New Energy, or the ARES
5 Coalition, we don't have a response from the
6 company. What is the status of that?

7 MR. FONNER: We had not prepared a written
8 response, your Honor. With respect to -- I would
9 note first of all that Commonwealth Edison provided
10 the responses to 18 of the data requests on the
11 16th of October, two more on the 18th of October.

12 Last evening the Company responded to
13 and sent out by priority mail, that should be
14 arriving at Mr. Fein's office this morning, sent
15 out responses to all but 3 of the requests. Two of
16 the three remaining requests ask for transcripts,
17 press releases, et cetera. These documents are not
18 kept in the media relations office at Commonwealth
19 Edison, are not maintained.

20 The only thing the Company would be able
21 to do would be to conduct a public search in the
22 public domain which the ARES Coalition could

1 accomplish just as easily. So there would not be
2 any documents forthcoming with respect to two of
3 those three data requests.

4 The remaining data request and narrative
5 responses to those two as well as the third, will
6 be provided today.

7 MR. FEIN: Can I respond? As you can see from
8 the motion to compel, the ARES Coalition timely
9 filed these data requests. The ARES Coalition's
10 ninth set of data requests sought highly relevant
11 information, the type of information that is
12 requested in the usual course of Commission
13 practice.

14 The problem here is a problem of the
15 Company's own making. They have refused to
16 respond. The vast majority of the outstanding
17 responses that I still have not seen as we sit here
18 today relate to their rebuttal testimony, which was
19 filed on September 20th. This was testimony filed
20 after an extension was sought due to the events of
21 September 11th.

22 Much of the outstanding responses deal

1 with some witnesses who had not previously
2 testified. Therefore, the information sought could
3 not have been requested any earlier than it was.
4 At a status hearing regarding that motion for an
5 extension of time to file, the Company refused to
6 identify who the witnesses were that were going to
7 be testifying. Again, a problem of their own
8 making.

9 When we initially contacted the Company
10 to inquire as to the status of these responses, it
11 was clear that there was no knowledge on the part
12 of counsel for when the responses would be
13 forthcoming, what the status of them were. We were
14 promised that we would receive some of the
15 responses yesterday, we were promised that we would
16 receive them electronically so that we could
17 expedite the review, that didn't occur. Again, the
18 company failed to meet its own deadline that it
19 imposed upon itself.

20 Obviously I haven't had a chance to
21 review them as we sit here today. I don't even
22 know if they are responsive, whether there is

1 objections. The information asked for, if you look
2 at the attachment to our motion, I mean some of the
3 information asks what do you mean by a certain
4 phrase.

5 The company has taken over 28 days to
6 provide that information, pretty basic information
7 that I think highlights the manner with which the
8 Company has handled discovery in this case. This
9 is the third type of motion we've had to file.

10 I think Examiner Casey will recall a
11 similar situation that occurred in Docket
12 No. 00-0361. The Company's decommissioning
13 proceeding where a host of discovery was dumped on
14 the parties on the eve of hearings and then we are
15 supposed to be prepared to go forward with cross
16 examination on that very day or the following day.
17 That completely prejudices the parties.

18 The two witnesses who are scheduled to
19 testify tomorrow for the company, Ms. Strobel and
20 Mr. Helwig, testify at length about the
21 reasonableness of the investments and distribution
22 reliability, distribution capital improvements,

1 incremental expenses borne by shareholders, all of
2 which is highly relevant information that we have a
3 right to conduct discovery upon. And those are the
4 ones that are outstanding.

5 So I think that it should be clear to
6 all the parties and clear to the judges, the manner
7 in which discovery has been conducted in this case,
8 and we would ask that either two manners of relief,
9 one either the testimony be stricken that addresses
10 these issues, or that the ARES Coalition be
11 provided with the opportunity to potentially recall
12 these witnesses at a time convenient to the ARES
13 Coalition after we've had an opportunity to review
14 the responses to discovery.

15 Additionally, Ms. Fonner's
16 representation this morning about the response that
17 it will not be forthcoming --

18 MS. FONNER: That's a mischaracterization. I did
19 not say that responses will not be forthcoming.

20 MR. FEIN: Well, if I understand, you indicated
21 that our request 9.8 and 9.13, which requested
22 copies of documents including, but not limited to,

1 transcripts, press clippings, videotapes, speeches,
2 testimony both by Ms. Strobel and Mr. Helwig
3 regarding issues to the Company's distribution
4 system are not kept in the normal course.

5 I would note for the record that a
6 similar, if not identical question was posed early
7 in this proceeding, with respect to statements by
8 Mr. Rowe, documents were provided in response to
9 that request. I note that the Company has provided
10 responses to City of Chicago data requests, in
11 particular City of Chicago data request 2.118 and
12 182 that purport to be various documents that are
13 kept by the Company's media relations department.

14 I would note that anyone might be able
15 to search a website and find releases that come out
16 of their media relations department. We simply
17 requested statements to test some of the statements
18 that the witnesses have placed in their testimony
19 that they seek to place in the record in this
20 proceeding, completely relevant and highly
21 probative information with respect to many of the
22 issues in this proceeding.

1 JUDGE CASEY: Ms. Fonner.

2 MS. FONNER: The company has never refused to
3 provide responses to anything. In fact, as I noted
4 earlier, the company provided 20 responses to these
5 data requests by October 18th, and has been
6 diligently working to provide responses to all
7 requests.

8 I would also note that with respect to
9 this particular motion, this motion was filed
10 before the data requests had even come due.
11 Commonwealth Edison didn't receive these data
12 requests until after the close of business on
13 October the 2nd, and were working diligently to
14 provide those data requests responses to Mr. Fein.
15 Narrative responses will be provided to all.

16 And with respect to 9.8 and 9.13,
17 Mr. Fein's point that one could easily search a
18 website is indicative of the fact that Mr. Fein and
19 the ARES Coalition could do that just as easily as
20 anybody at the Company. The fact is that these are
21 not maintained in the media relations department
22 for these particular individuals.

1 Whether or not documents are collected
2 and retained with respect to Mr. Rowe is not
3 relevant as to the fact of they do not have
4 documents with respect to the two individuals for
5 which Mr. Fein sought documents. So we have
6 responded to all but three. Those narrative
7 responses to the remaining three will be
8 forthcoming, and they will be provided today.

9 MR. FEIN: If I could briefly respond. If it's
10 the Company's position that they would object to
11 that data request because the ARES Coalition can
12 find that information itself, then it shouldn't
13 take 28, 29, 30 days to get that objection.

14 If we are provided with a timely
15 objection, as the data request requested, that we
16 be immediately notified if there is an objection,
17 so we can resolve it, which is I understand the
18 intent of the rules of practice to be, to try to
19 resolve these matters, that would be appropriate.
20 But unfortunately the Company waits until the 30th
21 day when they come due.

22 Any efforts at good faith responses in

1 14 days, I think have been obvious that there
2 hasn't been that commitment. And the Company has
3 taken the position that no responses are due until
4 28 days expire. And I think Ms. Fonner's response
5 certainly highlighted that. If they have an
6 objection to certain of our data requests, it
7 should not take 28, 29, 30 days on the eve of
8 hearings to receive them.

9 MS. FONNER: If I might respond briefly to
10 Mr. Fein's last comment. Commonwealth Edison
11 wasn't objecting to the requests 9.8 and 9.13, it
12 was simply indicating that after a complete and
13 thorough search, these documents are not
14 maintained.

15 JUDGE CASEY: That is going to be your response?

16 MS. FONNER: Yes, that's correct. And there is
17 in fact nothing left to compel. They will have
18 narrative responses for those remaining three, 9.21
19 will have a substantive response that they will
20 have forthcoming shortly by the close of business
21 today. There is simply nothing left at issue.

22 JUDGE CASEY: I think the point that Mr. Fein is

1 trying to get at, if you don't ordinarily keep that
2 documentation, how long does it take to figure that
3 out. We shouldn't be waiting 30 days to get that
4 answer, I think that's the point.

5 MR. FEIN: That's the point on those. This is
6 the first we've heard of that, obviously. I guess
7 I would like something clear for the record, is it
8 the Company's position that the office of Ms.
9 Strobel and the offices of Mr. Helwig do not keep
10 records of speeches or presentations or articles
11 that they write or are quoted in?

12 MS. FONNER: My information indicates that those
13 particular requests that you made for press
14 releases, transcript, et cetera, are not kept in
15 the media relations office, and that is something
16 that where these would be, the clearinghouse, if
17 you will.

18 MR. FEIN: Are they kept anywhere at the Company,
19 if not in the media relations department?

20 MS. FONNER: Well, presentations with respect to
21 Ms. Strobel have been previously produced in
22 response to another data request.

1 JUDGE O'CONNELL-DIAZ: Given the fact based on
2 Mr. Fein's representation that he has not had an
3 opportunity to review these responses that
4 Ms. Fonner has suggested the Company has responded
5 to the ARES Coalition with, we would like to afford
6 Mr. Fein that opportunity to review those documents
7 that I guess were sent yesterday or whenever they
8 were sent.

9 And with the caveat that if need be,
10 that any of the witnesses that are scheduled to
11 testify tomorrow would be available at some point
12 in time later in our schedule if the ARES Coalition
13 has any questions that, due to the lateness of
14 receiving that information, they were not able to
15 prepare for their cross tomorrow. So that will be
16 up to
17 Mr. Fein to advise us of that, based on his review
18 the documents which he has not seen yesterday.

19 MR. HANZLIK: Just so the record is clear, it has
20 not been demonstrated that any of these are late
21 they are being filed within the time periods of the
22 Commission's rule, and so I have some concern about

1 characterizing our responses as being late.

2 JUDGE O'CONNELL-DIAZ: Mr. Hanzlik, I'm just
3 going to stop you right there, because we do note
4 that tomorrow is the hearing and these two
5 witnesses, Mr. Helwig, and Ms. Strobel are going to
6 testify, and I think it's only fair that while you
7 are still not late, but they need this information
8 to be able to do whatever kind of cross they choose
9 to do. And we will afford them that opportunity.

10 The next motion is Com Ed's motion to
11 compel the data responses from NEMA. Mr. Munson,
12 we don't have any response from you with regard to
13 that. Have you filed a response?

14 MR. MUNSON: Yes, actually. And I ask that this
15 be brought up tomorrow as a result there is --
16 Mr. Goodman filed responses or a response to this
17 motion that should be at Ms. Fonner's office this
18 morning. I was unable to review it as my e-mail
19 system was down, and then it was not faxed prior to
20 this hearing. And I have not had a chance to
21 review the response.

22 My understanding is we had until noon

1 tomorrow to provide responses to Commonwealth
2 Edison with regard to these data requests, and that
3 was the time period that I was going on.

4 JUDGE CASEY: Mr. Munson, I guess I'm not clear.
5 Someone filed a response or is preparing a response
6 to this motion?

7 MR. MUNSON: Yes, Mr. Goodman is an attorney, and
8 has taken upon himself to draft a response to this
9 motion, and that is what I intend on filing in this
10 case on his behalf.

11 JUDGE O'CONNELL-DIAZ: But you just stated that
12 you filed this already, is it filed?

13 MR. MUNSON: He sent it to my office to review
14 and sent it to Commonwealth Edison.

15 JUDGE O'CONNELL-DIAZ: Is he an attorney of
16 record in this case?

17 MR. MUNSON: He's on the service list, I'm not
18 sure the distinction of attorney of record.

19 JUDGE O'CONNELL-DIAZ: I think you need to file
20 the response.

21 MR. MUNSON: I intend on filing the response.

22 JUDGE O'CONNELL-DIAZ: So you haven't filed

1 anything yet?

2 MR. MUNSON: No. And it was my understanding
3 that I had until noon tomorrow to do so.

4 JUDGE O'CONNELL-DIAZ: When is Mr. Goodman
5 scheduled to testify?

6 MR. MUNSON: He was scheduled on Thursday the 8th
7 at the status hearing last that we agreed upon, and
8 then the schedule was rearranged a bit to
9 accommodate some witnesses, and then he was set for
10 and is currently set for the 6th.

11 MS. FONNER: He's testifying by telephone, which
12 further complicates these issues.

13 JUDGE O'CONNELL-DIAZ: Mr. Munson, are you aware
14 of what is going to be filed, responses to the data
15 requests or a general response to the motion to
16 compel?

17 MR. MUNSON: I believe it's a response to the
18 motion to compel. It's NEMA's position that the
19 responses that were provided to Commonwealth Edison
20 are responsive and therefore there is objections to
21 the motion to compel.

22 JUDGE CASEY: If that's the case, if that's what

1 is going to be filed, then we are going to need to
2 see the responses, as well as the data requests
3 themselves.

4 MS. FONNER: The data requests and responses
5 themselves were filed as part of the errata to
6 Commonwealth's motion. But those are what -- that
7 was after the supplemental, those are the
8 supplemental responses from NEMA.

9 JUDGE O'CONNELL-DIAZ: Mr. Munson, could
10 whatever is going to be filed be filed by 4:00
11 o'clock today?

12 MR. MUNSON: Absolutely. Yes, I just would note
13 for the record that I received this motion to
14 compel on Monday afternoon and it is now Wednesday
15 morning. We just ask before you make a ruling on
16 this, that you afford us an opportunity to respond.
17 And it seems that you've done that by allowing us
18 until 4:00 o'clock.

19 JUDGE CASEY: We will reserve ruling on Com Ed's
20 motion to compel to National Energy Marketers
21 Association.

22 JUDGE O'CONNELL-DIAZ: The next motion will be

1 Com Ed's motion to strike portions of the rebuttal
2 testimony of Dr. O'Connor and Richard Spilky.

3 MR. FELDMEIER: Com Ed has moved to strike
4 certain portions of the testimony submitted by
5 Dr. O'Connor and Mr. Spilky that deal with a notice
6 that was sent to the Commissioners by, let's see if
7 we can get the name right here, Dominion Retail,
8 Inc., regarding Dominion's reasons for withdrawal
9 from this case.

10 We have moved to strike Lines 20 through
11 33 of that testimony. And we have advanced a
12 number of reasons in the paper that we filed. But
13 I think they come down to pretty basic evidentiary
14 points. We've moved to strike because both of the
15 witnesses here have not indicated in their
16 testimony that they have the proper foundation to
17 testify about affairs relating to Dominion.

18 And for related reasons, when they do
19 testify about Dominion, their testimony is based on
20 something that they just read or heard from others,
21 it's hearsay, it's an out of word statement that
22 they are repeating for the truth of the matter

1 asserted.

2 The overlay behind this is beyond the
3 sort of law school evidentiary points is the
4 context in which this is raised. Dominion was a
5 member of the ARES Coalition, it sent this notice
6 to the Commissioners, and now its witnesses are
7 pointing to the notice as evidence. And we think
8 under those circumstances, this is improper, this
9 is an improper way of creating evidence,
10 essentially, to put in the record.

11 If I could refer to the law that we've
12 cited in our brief, the law in Illinois is that
13 witnesses can testify only concerning matters that
14 fall within the scope of their personal knowledge.
15 And the party offering a witness has the burden of
16 showing that the witness they've put on the stand
17 does have personal knowledge of the subject matter
18 that the witness is testifying about.

19 Cited the Supreme Court case in support
20 of that proposition, People v. Ennis 139 Illinois
21 2d, 264. It's a bedrock of our evidentiary system.
22 The testimony that has been submitted in this case

1 doesn't indicate that there is personal knowledge
2 here.

3 Again, the testimony refers to why
4 Dominion is withdrawing from this case, and the two
5 witnesses are not related to Dominion. They are
6 both either officers or employees, as we've
7 indicated in our papers, of AES New Energy, so they
8 can't have foundation to testify about Dominion's
9 affairs and foundation for such testimony is not in
10 the testimony that's been presented.

11 For related reasons, when these
12 individuals do testify about Dominion it's hearsay.
13 Hearsay in Illinois is an out of court statement
14 stated in court for the truth of the matter
15 asserted, and that's what's been done here.
16 Basically these witnesses are just pointing to
17 something that somebody else said. That's the
18 classic definition of hearsay.

19 And this isn't a technical objection we
20 are raising, but a fundamental right of Com Ed is
21 being deprived here, because the key point behind
22 this is we can't cross examine on these statements.

1 Nobody here is from Dominion, we can't probe the
2 voracity of these statements because the person
3 making the statement won't be in the courtroom. So
4 our right to cross examine is being denied.

5 Again, the circumstances in which this
6 has arisen is this is a former member of the ARES
7 Coalition, they have created this notice that they
8 sent to the Commissioners. They basically created
9 evidence now that their witnesses are pointing to,
10 and that's an additional reason why this testimony
11 should be stricken.

12 MR. FEIN: May I respond?

13 JUDGE O'CONNELL-DIAZ: We are very interested in
14 your response.

15 MR. FEIN: For three separate reasons, we think
16 the Company's motion should be denied. First, the
17 type of evidence that the Company would like to
18 exclude is the type of evidence that an expert
19 would rely upon for his testimony or her testimony.

20 The evidence that is being relied upon
21 by Dr. O'Connor and Mr. Spilky is certainly allowed
22 by the Commission's rules, and under the rules of

1 evidence. It's the type evidence that a prudent
2 person and an expert would rely upon to draw these
3 two conclusions with which they testify about. The
4 reason that Dominion withdrew from the proceeding,
5 and the effect that the Company's actions are
6 having on the development of the competitive market
7 in this state, and that's what they testify about
8 in those lines of their testimony.

9 This type of evidence is allowed under
10 the Commission's rules of practice, as we noted at
11 Page 3 of our response. This type of evidence is
12 allowed under Federal Rule of Evidence 703, as we
13 mentioned at Page 4 of our respond.

14 Second, I would agree with Mr. Feldmeier
15 that again this is a basic evidentiary point, and
16 that is that while even if the Commission were to
17 find that Dr. O'Connor and Mr. Spilky did not
18 reasonably rely possible this letter, which I would
19 note for the record was not only circulated to the
20 parties, but filed along as an attachment to a
21 notice formally in this proceeding, that it's
22 admissible.

1 It's admissible under Federal Rule of
2 Evidence 803 Sub 3, and that is this out of court
3 statement shows the state of mind, motive, or
4 intent of the declarant, declarant being Dominion
5 on why they withdrew from this proceeding. Finely
6 --

7 JUDGE O'CONNELL-DIAZ: Mr. Fein, the letter that
8 you are talking about, that was individually mailed
9 to the separate Commissioners; isn't that correct?

10 MR. FEIN: It was individually mailed to the
11 Commissioners, it was served on every party to this
12 case, and then was filed as an attachment to a
13 notice that was formally filed with the ALJ.

14 JUDGE O'CONNELL-DIAZ: Yeah, after the fact,
15 correct? And wouldn't that be an ex parte
16 communication and therefore improper?

17 MR. FEIN: We belief that it was served upon all
18 the parties to the case, the parties were on
19 notice.

20 And finally, this motion is premature.
21 The witnesses haven't testified yet. Mr. Feldmeier
22 does not know what their personal knowledge is.

1 The purpose of cross examination is to find out
2 what a witness' personal knowledge is about
3 assertions in their testimony, just like any other
4 witness to a proceeding. Just like assertions from
5 their witnesses about certain reasonableness of
6 cost, certain other items. That's what the purpose
7 of cross examination is, to test a witness'
8 knowledge that goes to the weight of evidence
9 that's in their testimony.

10 We think that it's obviously clear why
11 the Company doesn't want these witnesses to talk
12 about what they've mentioned in their testimony.
13 Obviously they take issue with the testimony that
14 has been filed by Dr. O'Connor and Mr. Spilky on
15 these matters, and we believe that their motion --
16 they have provided an insufficient basis by which
17 to strike these portions of the testimony and ask
18 that you deny their motion.

19 MR. FELDMEIER: I would like to respond to the
20 three points that Mr. Fein raised. First, he said
21 that this is expert testimony and it gets in
22 because this is the type of thing that experts rely

1 upon. If you take a look at this testimony, this
2 isn't testimony, this is recitation of facts. This
3 is pointing to this notice and saying listen to
4 this for the truth of the matter asserted. It's
5 not the basis of an opinion, I think that's clear
6 from the way this is laid out.

7 Second, Mr. Fein also in his papers and
8 in his statements pointed to and referred to
9 Section 2610B, I don't know if he referred to that
10 in his argument, but it's in his papers. And that
11 section states that it relies on Section 1040 of the
12 Administrative Procedure Act, which says in
13 administrative proceedings things can come in if
14 they are the type of thing that reasonably prudent
15 people would rely on in the course of their
16 affairs.

17 An important point with that though is,
18 and it's a point that I'm going to talk a lot about
19 with respect to the motion to strike Mr. Schlissel,
20 is that that section doesn't allow the wholesale
21 admission of hearsay. That's a point that has been
22 addressed by the courts, Murelli v. Ward 734,

1 Illinois 2d, 87. Basically came right out and
2 said, hearsay is not a court statement offered to
3 prove the truth of the matter asserted. Such
4 evidence is inadmissible in administrative
5 proceedings unless it falls within one of the
6 recognized exceptions to the hearsay rule.

7 He has pointed to one of those, and I'll
8 talk about that in a minute. But the hearsay rule
9 is still in force in administrative proceedings.
10 And that's what we show here, South Limited v.
11 Pollution Control Board 656, Illinois 2d, 51,
12 stating general hearsay evidence is not admissible
13 in administrative proceeding. Citing several other
14 earlier cases.

15 So just to say that this is the type of
16 thing that people rely on, and it gets in because
17 this an administrative hearing, that is not
18 correct, hearsay is still barred.

19 Mr. Fein referred to section 803-3 or
20 Subsection 3 of the Federal Rules of Evidence, the
21 state of mind exception. I would like to read that
22 briefly. It says a statement of the declarants

1 then existing state of mind, emotions, sensations
2 or physical condition, such as a mental feeling of
3 pain or bodily health is a subject of a hearsay
4 exception.

5 This is an exception that applies to
6 individuals, primarily in criminal cases, when a
7 coconspirator or an individual talks about intent.
8 When things like intent or motive are at issue in
9 the case. It doesn't apply to corporations.
10 Corporations don't have bodily feelings, they don't
11 have what's referred to here in the rule as
12 emotions. And for the same reason they don't have
13 intent or design.

14 This is something that a specific
15 objection or exception that applies in the case of
16 individual thoughts and feelings and it's not
17 applicable of Dominion statements which are the
18 subject here.

19 Also I would point out in the case
20 they've cited, People v. Berry, in their papers as
21 indicative of this exception being adopted in
22 Illinois law, in referring to this type of

1 statement, the Court said that there must be
2 consideration of the likelihood of deliberate or
3 conscious misrepresentation, and that must be, this
4 is kind of a funny word, negative, not a word I
5 would use, but that's the word in the case.

6 Now, that's not negative here, that's
7 exactly what we have here because they have created
8 this piece of evidence recently and know they are
9 pointing to it. So in this situation, we would say
10 that the exception doesn't apply.

11 And finally, they have indicated that
12 the point is -- our motion is premature, that we
13 don't know what the scope of knowledge will be for
14 these individuals. Our position will be that in
15 preparing this direct testimony when counsel has
16 the ability to form testimony, written testimony
17 with witnesses, the foundation has to be there.
18 That's why we have this motion to strike, that was
19 their burden coming in. They failed to meet that
20 burden, they don't get to put that witness on the
21 stand and supplement.

22 And here I think it's more than a

1 technical issue of supplementation, these are AES
2 New Energy personnel, this barrier can't be crossed
3 their knowledge of Dominion's affairs is by
4 definition hearsay. So we would continue to assert
5 our motion and move to strike these portions of
6 the testimony.

7 MS. DOSS: Your Honor, Cook County would object
8 and ask that the reference to Mr. Schlissel's
9 testimony and the reason that Com Ed will agree
10 that the testimony should be stricken, should be
11 stricken from the argument, because that motion is
12 not before your Honor at this particular time, and
13 we have not responded -- and have no opportunity to
14 respond.

15 And I would make the objection at the
16 time he said it --

17 JUDGE CASEY: He was on a role.

18 MS. DOSS: Exactly.

19 JUDGE CASEY: Well, the motion to strike
20 particular portions of his argument will be denied.
21 I think we are well equipped to determine what we
22 are going to consider and what we won't and what is

1 proper and what is not.

2 Mr. Fein, do you have any final
3 response?

4 MR. FEIN: Just a couple brief points. Contrary
5 to Mr. Feldmeier's representation, the exception
6 under Federal Rule of Evidence 803 Subsequent 3
7 does apply equally in civil as in criminal cases,
8 as the case cited in our papers, as he refers to
9 them, indicates.

10 And I note that counsel cited references
11 to a couple of other cases that I did not see
12 contained in his motion. And obviously we have not
13 had an opportunity to respond to these additional
14 cases that he cited in his response to my argument
15 here today. And again, we believe that the motion
16 should be denied.

17 JUDGE CASEY: First and foremost, the
18 correspondence sent by the Dominion representative
19 is troubling. There was an entity represented by
20 counsel in a proceeding before us, to send
21 correspondence directly to the Commissioners, we
22 believe is ex parte and improper.

1 Having said that, we do not think it's
2 appropriate for the remaining members of the ARES
3 Coalition to boot strap or to use that
4 inappropriate correspondence in their rebuttal
5 testimony. We've considered the arguments of the
6 parties, both the movant and the respondent, and
7 conclude that the testimony, Lines 20 through 33,
8 should be stricken.

9 JUDGE O'CONNELL-DIAZ: The next order of
10 business is Com Ed's motion to strike the testimony
11 of Mr. Schlissel. And we will hear argument on
12 that motion today, however, we will most likely
13 take it under advisement.

14 MR. FELDMEIER: Your Honors, if I may, Com Ed has
15 moved to strike the testimony of Mr. Schlissel that
16 was filed on August 23rd of 2001. His testimony
17 has been submitted by the People of Illinois, CUB,
18 the City of Chicago and Cook County.

19 Mr. Schlissel in his testimony offers
20 opinion testimony regarding costs that he believes
21 should not be allowed in base rates in this
22 proceeding. However, his opinion testimony in this

1 case is not based on factual analysis, it's based
2 largely on reports that he has quoted from at
3 length in his testimony, basically the opinions and
4 observations of others.

5 In particular, he quotes at length in
6 the testimony to two specific reports, a report
7 prepared buy Liberty -- or a number of reports
8 prepared by the Liberty Consulting Group concerning
9 Liberty's investigation of aspects of Com Ed's
10 transmission and distribution systems from 1992 to
11 1999.

12 He also quotes at length from pages of
13 -- he also had pages of testimony that quote at
14 length from summaries of a report prepared by
15 Vantage Consulting concerning it's investigation of
16 outages that occurred on Com Ed's system from July
17 30, 1999 to August 31st, '99. So the just of this
18 is we have expert opinion testimony here that is
19 basically a recitation of opinion reports and
20 reports prepared by others.

21 And of course the risk here as we are
22 going to go into in a moment for Com Ed is that Com

1 Ed cannot properly cross examine with respect to
2 those reports. The drafters of those reports will
3 not be in the courtroom, Com Ed will have no way of
4 probing into the voracity or the context that went
5 into those reports, will not be able to properly
6 cross examine. And for that core reason, in
7 addition to other reasons, the testimony that we've
8 moved to strike in Mr. Schlissel's testimony should
9 be stricken.

10 We've raised four reasons for striking
11 this testimony in the motion that we've filed.
12 First, as I alluded to a moment ago, the Schlissel
13 testimony contains irrelevant and prejudicial
14 hearsay testimony that should be stricken, page
15 upon page of of such testimony.

16 Second, the documents relied upon by
17 Mr. Schlissel do not apply to the legal standard at
18 issue in this case, so simply allowing those
19 documents in evidence, when they were based on a
20 different standard, would be -- is incorrect. And
21 again, as we are going to refer to, that reasoning
22 has been relied upon by hearing examiners in the

1 past with respect to Mr. Schlissel's testimony and
2 by the Commission in striking his testimony that
3 was basically written in the same way that the
4 testimony that is at issue in our motion was
5 prepared.

6 We've also moved to strike the testimony
7 because it applies a hindsight standard, which is
8 not the applicable correct standard to apply in a
9 case like this, and because it contains these out
10 of court statements that do not address the test
11 year that is at issue here, and because of that the
12 testimony is irrelevant.

13 Striking Mr. Schlissel's testimony is
14 consistent with a prior Commission precedent,
15 including a commission precedent involving
16 Schlissel's testimony itself. Docket 90 -038 In Re:
17 Edison, a December 12th, 1990 opinion of the
18 Commission, this case did not involve Mr.
19 Schlissel, but it involved another witness, a Mr.
20 Chernin who basically, like Mr. Schlissel, as
21 indicated in our papers in the portion of this
22 opinion we've attached, selectively cited to

1 opinions of others in his expert testimony.

2 Com Ed moved to strike this testimony
3 and the motion was granted. And the Commission
4 concluded in this case, Mr. Chernin selectively
5 recited the opinions of persons that Edison was not
6 able to cross examine. And based on that finding,
7 the Commission determined that that testimony which
8 selectively cited to opinions should be stricken.
9 That's exactly what we have here.

10 If you look at the portions of the
11 testimony that are at issue in our motion, there
12 are selective citations to these reports which are
13 filled with opinions, opinions like Edison did not
14 spend appropriate amounts on this, opinion
15 statements of the drafters of the reports that are
16 outside of our ability to cross examine. Striking
17 Mr. Schlissel's testimony can be done simply
18 through a reliance on this prior Commission order.

19 But the Commission precedent regarding
20 Schlissel's testimony goes further. He presented
21 testimony in two fuel clause cases, when the fuel
22 clause was in effect for Edison. And again as I

1 indicated a moment ago, the method of his
2 testifying in those cases was the same as his
3 method is here. There instead of citing to
4 consultant's reports regarding the distribution
5 system, Mr. Schlissel was testifying on nuclear
6 operations.

7 And in his testimony he cited
8 extensively to reports that had been prepare by the
9 Nuclear Regulatory Commission and the institute of
10 nuclear power operations, an industry group
11 referred to as INPO. As he has done here, Mr.
12 Schlissel similarly tried to include the findings
13 of those reports as his testimony, and Com Ed moved
14 to strike on two occasions, both of the occasions
15 where he testified.

16 First occasion was the 1994 fuel
17 reconciliation case, Docket 95-0119 Karen Caille
18 was the examiner in that case, we have attached a
19 portion of the transcript in that case where Karen
20 Caille ruled and granted Com Ed's motion. And if
21 you take a look at that, I'll quote generally.

22 She concludes at Lines 9 through 11 on

1 Page 217 from the transcript that we've attached,
2 these reports are reports that use different
3 standards than the standard we use here at the
4 Commission to determine prudence. She also states
5 that she refers to the use of hindsight in Line 20
6 as a basis for striking the testimony.

7 So again, these are the same reasons
8 that we've raised here, different legal standards
9 in the report, use of hindsight which is not
10 permissible here, those were reasons Examiner
11 Caille used in striking similar testimony by the
12 very witness that we have at issue here. Her
13 ruling is equally applicable.

14 The same result were in Docket 97 -0015,
15 this was the 1995 fuel reconciliation case, where
16 Examiner King was presented with the same type of
17 testimony by Mr. Schlissel, relying upon NRC and
18 INPO statements, opinion testimony or out of court
19 statements. Again Com Ed moved to strike. The
20 Commissioners' final order in the case, which is
21 attached to our papers as indicated, the hearing
22 examiner struck portions of Mr. Schlissel's

1 testimony in certain exhibits of CUB containing
2 hearsay from the NRC and INPO which were hearsay,
3 were based on standards different from prudenc e,
4 involved hindsight and were not connected to any
5 specific outage in the proceeding.

6 It also indicates there was an
7 interlocutory appeal taken from that decision which
8 was denied. So we on two occasions, we have
9 administrative law judges striking Mr. Schlissel's
10 testimony. We have a Commission order striking the
11 testimony. And we also have evidence of an
12 interlocutory appeal being taken from that decision
13 in the '96 fuel reconciliation case and it being
14 denied.

15 So there is exact precedent with re spect
16 to what they are trying to do with Schlissel's
17 testimony here. And there is precedent which
18 indicates the testimony should be stricken.

19 I'll briefly refer to the judicial
20 decisions that we've cited, which are exactly in
21 line and which provide support for the Commission's
22 prior decision regarding Mr. Schlissel's testimony.

1 The sort of benchmark case in this area regarding
2 expert testimony in Illinois is Wilson v. Clark 84,
3 Illinois 2d, 186 where the Illinois courts adopted
4 the standard and federal rule of evidence 703,
5 which states that expert witnesses can rely upon
6 out of court statements if it is the type of
7 statement reasonably relied upon by experts in the
8 particular field in forming opinions or inferences
9 upon the subjects, the facts or data.

10 Now, the Commission has gone over this
11 ground before, and has held in previously striking
12 Mr. Schlissel's testimony that the type of hearsay
13 at issue here, the type of recitation of out of
14 court reports is not something that is reasonably
15 done by experts, it is not something that falls
16 within the scope of the Rule 703 that was adopted
17 by the Wilson v. Clark court.

18 The Supreme Court, again, in People v.
19 Anderson, another case that we've cited 113
20 Illinois 2d Page 1, holding that was directly
21 applicable here it says that a trial judge like
22 your Honor here of course need not allow an expert

1 to recite secondhand information when its probative
2 value in explaining the experts opinion pales
3 beside the possibly confusion.

4 Basically what this rule says is an
5 expert can't use materials that the expert relays on
6 as a way of circumventing the hearsay rule and
7 trying to get all sorts of things into evidence
8 that wouldn't come in independently. Secondhand
9 information, that's exactly what we have here,
10 that's exactly what the testimony of Mr . Schlissel
11 does.

12 I'll cite briefly to City of Chicago v.
13 Anthony another Supreme Court case, 136 Illinois
14 2d, 169. And in other holding applicable hearing,
15 another rule of law applicable to the case includes
16 the information sought to be relied upon by the
17 expert, the information may not be permitted to
18 come before the jury, the trier of fact here, under
19 the guise of a basis for the opinion of the expert.

20 That's what's happening here. We have
21 hindsight information, we have information used
22 incorrectly, not using the applicable legal

1 standard, and they are trying to get that before
2 the trier of fact under the guise of being support
3 for the expert's opinion.

4 If you look at Mr. Schlissel's
5 testimony, this so-called support for his testimony
6 is actually the bulk of what he's trying to get
7 into the record. It's pages, upon pages, upon
8 pages, his opinion is very briefly stated. That's
9 why the testimony has been filed, that's why it
10 should be stricken, that's why his testimony has
11 been stricken in the past.

12 So on those grounds, we would move to
13 strike the testimony.

14 JUDGE CASEY: Response.

15 MR. KAMINSKI: First off, if Com Ed had acted
16 timely, as was requested by the ALJ's in the
17 beginning of these proceeding, to the prefiling of
18 Schlissel's testimony where he refers to the
19 Liberty/Vantage reports, they could have either
20 first requested the ALJ's to subpoena the authors
21 of these reports, which were made for this
22 Commission. Or also could have required those

1 authors to provide witnesses to explain the
2 findings of those reports as was required by the
3 Commission in their emergency procurement
4 opportunity request.

5 They state clearly that those authors
6 must make available for a period of two years,
7 which we are still within, after completion of
8 investigation witnesses who can explain and support
9 the investigation, findings and recommendation in
10 written testimony, and under cross examination in a
11 formal Illinois Commerce Commission proceeding.
12 They did not take advantage of that. Rather, they
13 waited until eight days before the hearing began,
14 is going to begin this this case, to bring this
15 forward as a motion to strike. They had the
16 opportunity to cross examine, and allowed that to
17 pass.

18 Secondly, the Liberty and Vantage
19 reports are public records. They were responses
20 order by the Commission as an investigation of the
21 liability problems and outages that occurred in
22 1999.

1 JUDGE O'CONNELL-DIAZ: Was there any opportunity
2 for Com Ed to cross examine the authors of these
3 various reports that you are aware of?

4 MR. KAMINSKI: There were presentations made
5 before the Commission, and Com Ed was given the
6 opportunity to make their own presentations
7 regarding the findings of those reports. And Com
8 Ed did so, as they refer to in their rebuttal
9 testimony.

10 JUDGE O'CONNELL-DIAZ: These were presentations
11 to the Commission, they were not under oath; isn't
12 that correct?

13 MR. KAMINSKI: I'm unaware if they were under
14 oath, but they were proceedings before the
15 Commission. These are published on the ICC website
16 as the results of Com Ed's investigations into Com
17 Ed's difficulties in 1999.

18 And even if the Commission finds that
19 these are inadmissible on their own, expert
20 witnesses are entitled to rely on otherwise
21 inadmissible data or evidence that the experts in
22 the field ordinarily rely upon in forming their

1 opinions.

2 Now, in this case, this rate case, this
3 is an investigation regarding distribution plant
4 expenses. You must look at not only the test year,
5 but before, during and after this test year to
6 determine whether the expenses were properly -- are
7 indicative of a normalized test year, a levelized
8 test year, and also to determine whether there was
9 a substantial amount of capital used, should we
10 say, as in this case.

11 Now the reports are evidence of that
12 condition. They are offered, they support the
13 opinion of Mr. Schlissel that there is a likelihood
14 that impudent costs occurred during the test year
15 and that the audit -- an audit that he suggests in
16 his testimony, both on direct and in rebuttal
17 testimony, that an audit is necessary and
18 appropriate.

19 Regarding the precedent, which I must
20 note that there is no star decisis in Commission
21 orders, however the precedent that is cited by Com
22 Ed, the two cases regarding the full adjustment

1 clauses, refer to the limited scope of dealing with
2 retroactive billing for a specific period regarding
3 commodity costs. These are inherently difficult to
4 predict, and therefore the hindsight issue is
5 important in that case.

6 However, in this case, it is much better
7 to look at rate case proceedings, and in those it
8 has been done in the past, as I cited in our
9 response the Illinois Commerce Commission versus
10 Com Ed, Docket 83-0537, 84-0555 consolidated
11 addressed audits that were conducted regarding the
12 nuclear plant costs.

13 Additionally, the Central Illinois Light
14 Company versus Illinois Commerce Commission Docket
15 94-0040 refers to various surveys and leak reports
16 generated prior to the rate case that was involved
17 then, regarding the condition of CILCO's natural
18 gas distribution system. That is right on point.
19 It is analogous to the situation we have here, in
20 that we are talking about the analysis of the
21 condition of the distribution system prior to the
22 test year. And if any precedent is to be allowed

1 regarding Commission orders, those are far more
2 proper than fuel adjustment clause cases.

3 Finally, I would also note that in
4 answer to Docket 90-0038, there is a question of
5 reliability in those cases. In this case, we are
6 talking about a Commission response order report,
7 where Com Ed had the opportunity and took the
8 opportunity to respond to the findings that were
9 found -- that were offered in that report, and
10 those reports were made open and public
11 presentations before the Commission.

12 So the precedent of the FAC, the fuel
13 adjustment clause cases, and the the 90-0038, are
14 of less persuasive value than the rate cases that I
15 cited in my response. I would also note that these
16 same reports are referred to in staff testimony and
17 no such testimony has been -- no such motion to
18 strike has been brought before by Com Ed.

19 JUDGE CASEY: Is it the Company's position that
20 these type of reports, it would be improper for an
21 expert to rely on these types of reports to form an
22 opinion?

1 It's a narrow question. Not as to
2 whether it's a restatement of what is in those
3 reports, but that it would be appropriate for an
4 expert to rely on those reports to form an opinion.

5 MR. FELDMEIER: I have to give you -- I can't
6 give you a yes or no answer on that. But what I
7 could say is this, what Schlissel has done with
8 these reports goes far beyond what an expert is
9 permitted to do under Illinois law because this
10 isn't a case where Schlissel testifies, I've read
11 these two reports and considered them in arriving
12 at my opinion and there are other things that I
13 have considered and here is my expert opinion.

14 Instead, what has been done with these
15 reports is page after page of his testimony is a
16 recitation of the reports, and the law in Illinois
17 that I indicated in my main argument, and that is
18 indicated and cited to in our motion, says that is
19 what can't be done, you don't bring in secondhand
20 information, the way that it's been brought in
21 here, under the guise of support for an expert's
22 testimony, that is the controlling legal standard.

1 MR. JOLLY: If I might respond. I think
2 Mr. Feldmeier mischaracterizes Mr. Schlissel's
3 testimony. In fact, I think he does use these
4 reports to form his opinions. His opinions are in
5 response to Com Ed's repeated assertions that none
6 of its costs that it incurred during the test year
7 or prior to the test year were incurred as a result
8 of prior problems that it had had with its
9 distribution system.

10 He reviewed these reports, and based on
11 those reports, he challenges -- he relies on those
12 reports to challenge Com Ed's assertions that none
13 of those costs are in its rate base or in its
14 expenses. And based on that he attacks the
15 credibility of Com Ed's statements to that effect.

16 And he also recommends that the
17 Commission initiate an audit of Com Ed's
18 expenditures during its two year -- 1.5 billion
19 two-year recovery program that it announced in
20 September of 1999 to determine if, in fact, any of
21 those expenditures incurred during that period were
22 the result of past mismanagement, and whether or

1 not they should be recovered and whether they
2 should be recovered in delivery service rates.

3 JUDGE CASEY: Mr. Jolly, I'm looking through the
4 excerpts that were attached to the motion, and I'm
5 trying to find the responses by Mr. Schlissel where
6 he said, yeah, I reviewed the information and based
7 on that information, and based on whatever, my
8 opinion is this. Now, maybe it's because it's been
9 excerpted, and I haven't seen the entire testimony.

10 MR. JOLLY: If I could respond.

11 JUDGE CASEY: The problem is we don't want a
12 regurgitation of someone else's report if that's
13 your opinion. Opinion testimony is supposed to be
14 your opinion and not a restatement of somebody
15 else's.

16 MS. DOSS: Your Honor, while he's looking for
17 those excerpts, I agree that Mr. Schlissel is an
18 expert and able to make his own independent
19 opinion, which he has done in testimony. But with
20 respect to the reports themselves, I think it's
21 important not to -- for the Commission not to be
22 misguided in the sense of thinking that these

1 reports have simply secondhand information. Mr.
2 Feldmeier tries to diminish what these actually
3 are.

4 These reports are public records. The
5 Commission hired these consultants as their staff.
6 Normally we're accustomed to in-house staff, and so
7 we are very, you know, comfortable with that. But
8 now that the Commission actually chose an outside
9 consulting firm, Com Ed is saying well, no way,
10 these aren't consultants, these are just secondhand
11 people who came in and gave a report.

12 In addition, the Commission also adopted
13 these reports. The motion was made by the
14 chairman, and it was an actual adoption of these
15 reports and findings to the point that it was a
16 public record. None of the Supreme Court rules,
17 public rules are evidence and so there even if,
18 although I say Schlissel did give an independent
19 opinion, even assuming that he didn't, these
20 reports are public record and the factual findings
21 in those records are, as public records, are
22 admissible under the Illinois Supreme Court rules.

1 JUDGE CASEY: Mr. Jolly was looking for some
2 excerpts.

3 MR. JOLLY: And looking at Mr. Schlissel's direct
4 testimony he discusses that he is unable to
5 quantify the L and M expenditures that could have
6 been avoided, because he is a respondent in
7 discovery. And he goes on in his rebuttal
8 testimony recommending that an audit be conducted
9 because he is not able -- in his opinion, he
10 cannot, nor can the Commission determine what costs
11 that are included in Edison's proposed revenue
12 requirement are the result of past mismanagement.

13 And those citations to the Liberty and
14 Vantage reports are not being used to say they were
15 imprudent as Vantage and Liberty suggests, rather
16 that they call into question Edison's repeated
17 assertion that none of the costs that are included
18 in the revenue requirement are the result of past
19 mismanagement, as Mr. DeCampli and others have
20 testified.

21 He is relying on those reports to
22 challenge those statements made in Edison's

1 testimony which they've also made in discovery
2 responses.

3 MR. FELDMEIER: If I could respond. There are a
4 number of arguments, if I could address them
5 individually. I think Mr. Jolly, in referring to
6 Mr. Schlissel's testimony really kind of summed
7 things up correctly. He said Mr. Schlissel has
8 read these reports, and these are the basis of his
9 opinion. That is not expert testimony, that is the
10 recitation of hearsay and that's the basis of our
11 motion. There is no expert analysis here, there is
12 simply I read this and this is what it says.

13 That was the basis of why we moved to
14 strike Schlissel's testimony in the past and were
15 successful and that's the basis for why this
16 testimony shouldn't come in under Illinois law.

17 Ms. Doss indicated that these are public
18 records and there is a public records exception to
19 the hearsay rule. In the response to our motion
20 that was received yesterday afternoon, they have a
21 section which says these are public records. They
22 don't talk about a public record exception to the

1 hearsay rule. They cite to the administrative
2 notice section of the Commission's rules and a
3 section which says the Commission can take
4 administrative notice of generally recognized or
5 technical facts within the specialized knowledge of
6 the Commission.

7 The type of reports these Liberty and
8 Vantage reports are are not basically the stuff
9 that administrative notice is made of. Scientific
10 or technical knowledge would be things, like in the
11 fuel adjustment case, certain workings of a power
12 generation facility that have come up in prior
13 cases and the Commission can take notice of the
14 technical issues involved if it's been down that
15 road before. The same thing with the operation of
16 the distribution system.

17 Here we are talking about specific
18 factual findings with respect to events in which,
19 in some cases, took place over a long period of
20 time. That is not the type of thing this rule
21 would contemplate administrative notice being taken
22 of. If you take a look at the type of things that

1 the Commission could take an administrative notice
2 of, it's things like rules, regulation, written
3 policies of governmental body, licenses and
4 certificates. Pretty mundane stuff. Not the type
5 of things, the detail type of report that was
6 undertaken here.

7 Mr. Kaminski indicated as his initial
8 argument that Com Ed didn't act timely here, and
9 what Com Ed should have done when it received this
10 testimony is gone out and started issuing subpoenas
11 and undertaking it as its burden bringing these
12 people before the Court so proper cost examination
13 could occur. That is simply not the law in
14 Illinois.

15 If an expert relies upon something and it
16 is improper, the person who is on the receiving end
17 of that testimony is not required to hunt down the
18 source of the statements, bring them before the
19 tribunal so they can cross examine them. Frankly,
20 it is an unworkable standard.

21 You asked the question of whether cross
22 examination could occur, and Mr. Kaminski referred

1 to certain meetings, and I will take him at his
2 word there was an opportunity to question, but
3 there is no record, there was no cross examination,
4 we don't have any record of what occurred, so
5 that's irrelevant to whether there has been the
6 ability to cross examine the type of material they
7 seek to introduce into the record in this case.

8 Finally, Mr. Kaminski said there is no
9 star decisis at the Commission, you are not bound
10 by this. We are not saying that you are bound by
11 star decisis here, you have no room to assess this
12 on your own, we just mean you just follow these
13 prior decisions because they are correct and they
14 showed what other hearing examiners at that time
15 have done when faced with the identical issues. We
16 think that their ruling should be followed here.

17 MR. JOLLY: I think first of all Mr. Feldmeier
18 mischaracterized something I said. I think that
19 the reports that Mr. Schlissel quotes from form the
20 basis of his opinion. And his opinion is based
21 upon what -- you have to consider what the legal
22 context of this case is. Legal context of this

1 case is Edison bears the burden of proving that
2 it's proposed rates, and each component of those
3 rates, are just and reasonable.

4 And by looking at these reports,
5 Mr. Schlissel forms an opinion by saying these
6 reports, as well as Com Ed's own internal reports,
7 raise questions as to whether or not the costs that
8 Edison seeks to include in its rates in this
9 proceeding are just and reasonable.

10 He's not relying on -- he's not saying
11 that the findings that are made by -- in the
12 Vantage and Liberty reports are -- he's not
13 offering those for the truth of the matter
14 asserted, all he's saying is those call into
15 question whether or not Edison is meeting its
16 burden of proof whether or not they can demonstrate
17 that the costs they are seeking to include are in
18 fact just and reasonable and are not based on costs
19 that were incurred due to past mismanagement, or
20 imprudent actions on its part.

21 JUDGE CASEY: Okay, Mr. Jolly, in either his
22 direct or rebuttal, you seem to wrap up what you

1 think his opinion is, either in his direct or
2 rebuttal, does he do that?

3 MR. JOLLY: Yes.

4 JUDGE CASEY: Could you please direct that to us?

5 MR. JOLLY: On Page 19 of his direct testimony.

6 JUDGE CASEY: Page 19 of the direct.

7 MR. JOLLY: Correct, the last page, or actually
8 next-to-last page starting at Line 12, there is the
9 question, Have you been able to quantify the
10 distribution L and M expenditures that should be
11 disallowed?

12 And he has referred to the fact that he
13 hasn't received an analysis from the company, any
14 analysis showing a breakdown of the costs that they
15 incurred during its two-year recovery program to
16 determine whether costs that were incurred were
17 based on imprudent actions.

18 His references to the reports are
19 merely -- to the Liberty and Vantage reports are
20 there to out point that these things have been
21 called into question and we asked them in discovery
22 repeatedly for breaking down these costs. And

1 Edison said they deny having the information, they
2 don't have it broken down, and they couldn't
3 provide the information.

4 So based on what's said in the --
5 relying on what's said in the Liberty and Vantage
6 reports, plus Edison' refusal to provide the
7 information requested in discovery, he's saying we
8 don't know, we don't know what should be included
9 or excluded and as a result that Edison doesn't
10 meet its burden of proof.

11 And he goes on in his rebuttal testimony
12 at Page 8 to suggest that the Commission conduct an
13 audit. So at Lines 9 and 10 a detailed audit is
14 needed to examine the reasonableness of the
15 distribution plan expenditures that Com Ed is
16 seeking to add to rate base in this proceeding, for
17 those very same reasons. Edison hasn't provided
18 sufficient detail and Edison's own internal
19 studies, plus the studies commissioned by the
20 Commission call into question whether the costs
21 they are trying to include in its rates are
22 properly included.

1 JUDGE CASEY: Does anybody have anything in
2 addition? Good ahead, Mr. Feldmeier.

3 MR. FELDMEIER: Mr. Jolly has pointed to certain
4 portions on Page 19 and to some of the direct where
5 it is summed. If you look at the testimony as a
6 whole, as you pointed out, what we are moving to
7 strike is not that, we are moving to strike really
8 the bulk of what is attempted to be interjected
9 into the record here, and that's the page upon page
10 of recitation about out of court statements.

11 That recitation is not necessary in that
12 detail for the opinion that has been arrived at.
13 We are not moving to strike the opinion, just the
14 improper predicate.

15 Also Mr. Jolly indicated that he's
16 relied upon Com Ed's internal reports. We haven't
17 moved to strike those because that's not hearsay.
18 That's something that we stated that's an
19 admission. And we have the ability to deal with
20 that, we can talk to the person who made that
21 statement and deal with it. But with these other
22 out of court statements we don't have that ability,

1 and it's not proper for all of that information to
2 come in the record when we have no means of cross
3 examining with respect to it.

4 MS. DOSS: And again, Cook County reasserts its
5 objection to that in the sense that this is public
6 record, it is not hearsay, secondhand information
7 and as such under the Supreme Court Rules, Supreme
8 Court Rules 216, any public records of factual
9 conclusions are evidence and deemed properly
10 evidence and Com Ed has an opportunity to cross
11 examine, as Mr. Kaminski pointed out. They could
12 have called Vantage and Liberty and actually cross
13 examined them if need be.

14 So Cook County believes this motion is
15 frivolous. Com Ed doesn't like the results of
16 Vantage and Liberty report because it's not their
17 own report. They are rejecting the fact that the
18 Commission chose Vantage and Liberty to do their
19 investigation, and they are simply an outreach of
20 their staff.

21 They didn't have in-house staff to do
22 it, so they actually hired, bid it, contract it

1 out, bid it and chose Vantage and Liberty to be
2 their staff and now Com Ed wants everyone to
3 overlook that fact and try to pretend that this is
4 simply hearsay or secondhand information and that
5 we can't really rely on it, when the Commission has
6 adopted these reports and have looked into it, and
7 documented the findings of the reports.

8 So I think we have just wasted like 30
9 minutes arguing over something that should have
10 never been done. And also, I would note that this
11 motion was filed October 24th, we had to respond,
12 we filed a written response October 30th. So if
13 there are some cites that are not in there, I don't
14 think that should be held against governmental
15 parties because we did the best we could. We are
16 arguing October 31st at 10:00 o'clock on this
17 motion that shouldn't have been filed in the first
18 place.

19 JUDGE CASEY: Mr. Jolly, Mr. Kaminski, does
20 anybody intend to try to file either the Vantage
21 consulting or the Liberty consulting reports? It's
22 not evidence, despite Mrs. Doss' assertion that

1 it's evidence because it's a public record. It's
2 not evidence unless it's admitted. Is someone
3 seeking its admission?

4 MR. JOLLY: If your ruling would somehow --

5 JUDGE CASEY: If you are looking for us to tip
6 our hand, no.

7 MR. JOLLY: If you desire, we certainly could
8 submit those reports. But if I could just respond
9 quickly to something Mr. Feldmeier said, he
10 indicated that he had a problem with the level of
11 detail that's cited in Mr. Schlissel's testimony.
12 To me it seems to me he's not questioning the
13 concept, it's the amount of detail, what he goes
14 into. Maybe a little bit, maybe a few quotations
15 would be okay, but's the amount of quotations.

16 I get the feeling that -- these are
17 properly relied on, it's a reliable report in that
18 it's a Commission response order report that the
19 Commission adopted. It is unlike the prior cases
20 in which the CUB witness in the two fuel adjustment
21 clause cases and the City witness in the lease cost
22 planning case relied on reports that the Commission

1 had nothing to do with. These are inherently
2 different, these are proper to rely upon.

3 He is relying on these reports to come
4 to a conclusion, and I think in his statements
5 Mr. Feldmeier admits that is a proper thing to do,
6 but Edison is embarrassed by what's in those
7 reports and so as a result they are not happy he is
8 reciteing page after page of the conclusions that
9 are reached in the reports.

10 JUDGE O'CONNELL-DIAZ: Mr. Kaminski earlier when
11 we first started the arguments, and I think it was
12 in your argument, you suggested that the
13 consultants would be available for two years after
14 the -- could you restate that for the record,
15 please?

16 MR. KAMINSKI: Certainly, and I'm referring
17 to -- and I have copies if you would like to look
18 at these.

19 MR. JOLLY: It's Commission's RFP for consultants
20 to conduct. The results included in the RFP was a
21 requirement that the respondents make available for
22 two years after the final report witnesses to be

1 available for cross examination in a formal ICC
2 proceeding.

3 MR. KAMINSKI: It's on the third page of the
4 handout that I've given you, under G states that
5 those that bid for this opportunity must make
6 available for a period of two years after
7 completion of the investigation a witness or
8 witnesses who can explain and support the
9 investigation, findings, and recommendations in
10 written testimony, and under cross examination in a
11 formal Illinois Commerce Commission proceeding.

12 I would also note that Mr. Feldmeier
13 referred to the fact that there was no record of or
14 did not know if there was a record regarding
15 presentation to the Commission. However, there is
16 available on the website the transcript of the open
17 meetings, both the day that the Vantage authors
18 made their presentation, and I would note the
19 second day, where Com Ed replied in 100 pages of
20 transcript and were questioned by the Commission
21 regarding the findings.

22 Also on top of that, as I stated

1 earlier, Com Ed in its rebuttal testimony refers to
2 their replies to the Liberty report.

3 MR. FELDMEIER: If I could respond to one point,
4 and that has to do with the emergency procurement
5 opportunity. After the portion that
6 Mr. Kaminski quoted about making these individuals
7 available for cross and their written testimony in
8 an Illinois Commerce Commission proceeding, that
9 paragraph continues to state that these people will
10 be made available and can provide expert assistance
11 to the Commission or its staff and Commission
12 counsel in all matters relating to such proceeding
13 including discovery and the preparation of
14 pleadings, briefs and other legal documents.

15 What this provision contemplates is if
16 staff calls upon these entities who bid on this to
17 come in and work on a case, they would be obligated
18 to do so. It doesn't obligate them to basically
19 stand ready at all times if anybody should call to
20 present witnesses and to prepare written testimony
21 and stand ready for cross.

22 I take it, and I've just received this

1 document, but this contemplates a contract with the
2 Commission, with the staff of the Commission, that
3 would be the party that would have the ability to
4 call in and require these things to be done. I
5 don't think Edison could get on the phone and say
6 we are relying on this provision to a bidding
7 contract that we are not a party to, you now need
8 to come in and make yourself available. We
9 couldn't do that. That is not a reason for
10 allowing them to rely on this.

11 MS. DOSS: But that supports my argument that
12 they are staff.

13 MR. JOLLY: And I guess if Edison really desired
14 to cross examine these people, they could have
15 invoked the subpoena power of the Commission, and
16 Mr. Feldmeier's earlier suggestion that somehow it
17 would have been improper for Edison to do that,
18 assumes that Mr. Schlissel's testimony on these
19 points is inappropriate and we don't agree with
20 that.

21 So his statement as to Illinois law that
22 somehow the burden is not on them because they have

1 no burden to ask for a subpoena and to inquire
2 about inappropriate testimony, we disagree with his
3 characterization of that testimony as
4 inappropriate.

5 JUDGE CASEY: All right, we will take this under
6 advisement. A concern, though, is obviously you
7 feel strongly, this is important information. And
8 we're just trying to figure out why it's not being
9 offered, if it's that important.

10 We will take a look at the testimony
11 that was submitted, we will consider the arguments
12 that have been made by both the proponent and
13 respondents, and we will issue a ruling on it.

14 MS. DOSS: Your Honor, we didn't say that we
15 wouldn't offer it, we can offer those reports into
16 evidence.

17 JUDGE CASEY: No one has offered them as of yet.

18 JUDGE O'CONNELL-DIAZ: Are there any motions in
19 limine that we need to deal with or anything which
20 is also what we were to deal with today? Are there
21 other motions or any other matters?

22 MS. FONNER: The only matter is on Friday your

1 Honor had directed that one copy of all testimony
2 that has been filed by e-docket as well as one copy
3 of all corrected testimony be provided to the
4 administrative law judges for marking. And we have
5 with us today the documents relating to all
6 Commonwealth Edison witnesses that will be
7 testifying tomorrow.

8 I will need to supplement this with the
9 affidavit that is to accompany Ms. Leitzell and
10 Mr. Meehan's testimony, but we have one hard-copy
11 for your Honor at this time.

12 JUDGE O'CONNELL-DIAZ: Is there also the errata
13 for that as well?

14 MS. FONNER: The errata itself is not. It is my
15 understanding that we were simply filing the
16 original.

17 JUDGE CASEY: We need the errata as well.

18 MS. FONNER: All right. We will provide the
19 errata.

20 MR. FEIN: We, as well, have our testimony here
21 for presentation. Based upon your ruling striking
22 some lines of the rebuttal testimony today, I would

1 be prepared to line through it, your Honor,.

2 MR. NEFF: I just have a mechanical question if a
3 word has to change or a number has to change, do
4 your Honors prefer that the testimony be reword
5 processed or that the changes be made by hand so
6 they are visible on the testimony itself in written
7 form?

8 JUDGE CASEY: If the testimony that is being
9 sought to be admitted is different from what's been
10 e-docket filed, then we need the old three copies,
11 if there is any changes.

12 MR. NEFF: And you want them corrected and -- the
13 --

14 JUDGE CASEY: The corrected version.

15 MR. NEFF: But I'm just trying to clarify if you
16 want them corrected via word processing if changes
17 are small or just by handwritten changes if it's
18 small.

19 JUDGE CASEY: If they are small, but we still
20 need the three copies because it's something
21 different than what is filed.

22 MR. NEFF: That's what I was concerned about,

1 thank you, your Honor.

2 JUDGE CASEY: As far as -- Mr. Fein.

3 MR. FEIN: Just because of that long discussion
4 we had on Friday went all around, I have an
5 original copy of what was filed as well as the
6 corrected copy, as well as the errata.

7 JUDGE CASEY: And those were -- all three were
8 sent to the clerk via e-docket?

9 MR. FEIN: That's correct. Is that what the
10 clerk needs, basically those three pieces?

11 JUDGE CASEY: Yes, sir.

12 MR. FEIN: And it's because there is a
13 confidential version, too.

14 JUDGE CASEY: With respect to future filings or
15 submissions for stamping, at 3:00 o'clock each
16 afternoon outside the hearing room will be a table
17 and a clerk to take your testimony for the next
18 day. Then this matter is continued to 9:30
19 tomorrow morning.

20 (Whereupon the above-entitled
21 matter was continued to November 1,
22 2001 at 9:30 a.m.)